Supreme Court, U.S.
FILED
JUL 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1708

In the Supreme Court Of The United States

OCTOBER TERM, 1988

SPAWR OPTICAL RESEARCH, INC.
WALTER J. SPAWR, AND
FRANCES SPAWR, PETITIONERS
v.
UNITED STATES OF AMERICA, RESPONDENT

BRIEF OF THE LASER AND ELECTRO-OPTICAL MANUFACTURERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF *AMICUS*

The Laser and Electro-Optical Manufacturers Association (LEOMA), formerly the Laser Association of America, is a non-profit trade association representing companies which manufacture more than 90 percent of the laser and electro-optical equipment produced in North America. LEOMA is concerned with both the scientific and the economic progress and well-being of this critically important industry. The laser and electro-optical products this industry produces and the technology it develops plays an integral role in

numerous other industries that comprise the high technology component of United States industry as well as basic manufacturing industry generally.

One important factor involved in the economic stability and progress of the laser and electro-optical industry and the high technology sector of United States industry is to keep pace with world competition in both the quality and price of products and in technological progress. Thus the export market and the exchange of goods and ideas throughout the world is essential to maintaining United States leadership in world high technology competition.

LEOMA has followed the *Spawr* case for several years and its Board of Directors and members believe that his case raises an issue of ultimate importance to our industry, and to all of the United States industrial and high technology establishment. This issue is also relevant to this nation's deteriorating position with respect to the balance of trade and payments. Resolution of this issue is essential if we are to maintain this nation's world leadership in the high technology market of the future.

ARGUMENT

I. INTRODUCTION AND SUMMARY

This case raises the issue of what is the United States government's burden of proof in criminal prosecutions under the Export Administration Act for exporting without a license commodities or technologies that have been listed on the Control List by the Secretary of Commerce. Until the decision by the divided panel of the Court of Appeals for the Ninth Circuit in the *Spawr* case, it seemed clear that the government, in order to obtain a conviction, must prove that the commodity or technology had been listed on the Control List by the Secretary, that it had been willfully and intentionally exported, and that no validated license had been issued by the Secretary of Commerce permitting the export.

The decision by the divided panel of the court below would relieve the government prosecutor of the necessity of proving beyond a reasonable doubt before the trier of fact, be it judge or jury, that the commodity or technology had in fact been listed on the Control List. Instead, according to the divided panel, if the prosecution alleges that the commodity or technology has been placed on the Control List, this allegation must be accepted as proven. The divided panel stated that it did not matter whether the allegation was right or wrong, the trier of fact in the criminal proceeding must accept the allegation as having been proved. Moreover, the accused exporter would not even be allowed to dispute or rebut this allegation that the

commodity or technology had been placed on the Control List because, according to the divided panel, the issue is not one that a judge or jury is competent to consider. Under this holding, once the prosecution shows that a commodity or technology has been exported intentionally, and not to have been exported as a result of some excusable mistake, the criminal conviction of the exporter is inevitable.

This view of the government's burden of proof conflicts sharply with that expressed by courts in the First and Eighth Circuits and with a more recently decided case in the Ninth Circuit as well. It also raises a fundamental Constitutional issue whether such a special system of criminal procedure denies trial by jury under the Sixth Amendment and Due Process under the Fifth Amendment. It is of the utmost public importance that this conflict be resolved.

II. THE INSTANT MATTER IS ONE OF NATIONAL SIGNIFICANCE POTENTIALLY AFFECTING ALL EXPORTERS, THE INTERNATIONAL COMPETITIVENESS OF U.S. BUSINESSES, AND THE BALANCE OF TRADE AND PAYMENTS

Historically, the United States has not imposed export controls except in times of war or national emergency. Largely in response to "Cold War" considerations, Congress, in 1949, enacted the Export Control Act (ECA) which imposed a comprehensive system of export controls intended primarily to prevent export to the Soviet bloc of commodities or data that

would be of significant value to Warsaw Pact military systems. The ECA granted the Executive Branch virtually plenary power to cut off the export trade of the United States by denying export privileges to any person. The Act provides, "To effectuate the policies set forth in Section 2 hereof, the President may prohibit or curtail the exportation from the United States, its Territories, and possessions, of any articles, materials or supplies, including technical data, except under rules and regulations as he shall prescribe." 50 U.S.C. App. Sec. 2023(a) (1982). The President has delegated this authority to the Secretary of Commerce and the program is administered by the Office of Export Control of the Bureau of International Commerce.

Section 2 of the Act articulates three policies which the President is directed to effectuate by the imposition of export controls: protection of commodities in short supply; furtherance of United States foreign policy; and protection of national security.

The regulatory apparatus to control exports under the Export Administration Act (EAA), which succeeded the ECA, is a federal export licensure system which includes, *inter alia*, individual validated licenses (IVLs) which authorize the export of a specific commodity that has been determined to be "nonstrategic," which means that the item to be exported will not enhance the scientific, technical or industrial capability of the nation that is the ultimate recipient in a manner that will be harmful to United States national security.

The critical element in this licensing system is the Commodity Control List. The Act directs the Secretary of Commerce to maintain a Commodity Control List (CCL) which catalogues commodities and technology. 50 U.S.C. App. Sec. 2403(b) (1982). The CCL specifies the types of export license required for a specific export to a stated destination. *Id.* and Section 2403(c)(l). Thus, whenever a commodity is listed on the CCL, it cannot be lawfully exported unless the exporter first obtains a validated license authorizing the export.

As early as 1978, Secretary of State Dean Rusk recognized the national significance of the Export Administration Act stating:

> We should begin by reminding ourselves that trade occurs when it is of benefit to both parties. When we refuse to trade for security or political reasons, we should recall that we are depriving ourselves of the benefit of that trade, whether in the form of convertible currencies or goods or services which we ourselves need for our national life. During the postwar decades when we were in a very strong trade position, many of us tended to think of trade as a "favor" which we were doing for somebody else. That attitude is a luxury which we may not be able to afford with our present large trade deficit.

Use of Export Controls and Export Credits for Foreign Policy Purposes: Hearings on the Increasing Use by the Executive Branch of Protections on U.S. Exports and Export Credits for the Purpose of Promoting Foreign Policy Objectives Before the Senate Committee on Banking, Housing and Urban Affairs, 95th Cong., 2d Sess. 146 (1978).

The trade deficit has increased many-fold in the ensuing decade and underscores the urgency of the statement put forward by Secretary Rusk more than a decade ago. The United States paramountcy in the design and manufacture of high technology commodities has eroded. Technological progress by other nations made available alternative sources of such commodities which the United States could not effectively control. Export regulation by the United States exacted an increasing economic penalty as the United States exports were replaced by alternative foreign sources due to the delay inherent in the United States export control regulatory system.

The National Academy of Science (NAS) assembled a panel of experts to consider the "Impact of National Security Controls on International Technology Transfer." Balancing The National Interest - U.S.National Security Export Controls and Global Economic Competition, National Academy Press, Washington, D.C. (1987), hereafter cited as NAS Report. The purpose of this study was, "to seek strategies to regulate the international transfer of technology through industrial channels in such a manner as to balance the national objectives of national security, economic vitality, scientific and technological advance, and commercial, educational, and personal freedom." *Id.* at 181.

The NAS Panel's study was comprehensive. It was supported by both the NAS Committee on Science, Engineering, and Public Policy, *Id* . at v, and by the efforts of

an expert professional staff who organized briefings by numerous relevant federal agencies, including, *inter alia,* the Central Intelligence Agency, the FBI, the Departments of Commerce, Defense, State and Treasury, the National Aeronautics and Space Agency and the Department of Justice. *Id.* at iv. The professional staff also organized the Panel's foreign fact-finding missions (which included on-site investigations in six European and five Asian countries) and assisted in the preparation of the reports on the findings from these foreign visits. *Id.* App. B, at 183-220. Given the experience and qualifications of the investigation's participants, the scope and thoroughness of the investigation, and the in-depth access to the current facts and evidence that comprise the reality of the administration of the EAA program, the NAS Report findings are clearly the most comprehensive and authoritative analysis ever conducted on the export control process.

Based in large part on data provided by the Department of Commerce, the NAS Report estimated that the Department's administration of the CCL has imposed a requirement for a validated license involving approval by the Department of Commerce prior to export of over 50% of all United States exports of non-military manufactured goods in 1985. *Id.* at 10. These exports that were subjected to prior approval licensing by the Department of Commerce had an estimated value of $62 billion. *Id.* Moreover, national security export controls apply to sales of commodities by the United States corporate affiliates abroad. The NAS Report estimated that the value of this

category of licensable commodities approximated an additional $22 billion in 1985, bringing the total volume of goods subjected to prior approval regulation to $84 billion. *Id.* at 29.

Thus, the universe of active export control regulation in 1985 encompassed more than one half of all United States exports. Since *Spawr* potentially affects exporters of all of these goods and services, it is clearly a case of national significance.

III. AFTER THE DECISION OF THE DIVIDED PANEL OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE SPAWR CASE, CONFUSION EXISTS ABOUT THE GOVERNMENT'S BURDEN OF PROOF IN CRIMINAL PROSECUTIONS TO ENFORCE THE EXPORT ADMINISTRATION ACT.

The relevance of the instant case to all exporters is clear. If the decision of the divided panel of the court below is not reviewed and reconciled with conflicting decisions by courts in the First and Eighth Circuits and a more recent decision in the Ninth Circuit, it will be impossible to know what constitutes the elements of the criminal sanction imposed by the EAA.

Under the decision in *United States v. Moller-Butcher*, 560 F. Supp. 550 (D. Mass. 1983) and *United States v. Gregg*, 829 F.2d 1430, 1437 (8th Cir. 1987), the federal government must prove beyond a reasonable doubt that (1) the commodity or technology at issue was in fact listed on the Control List (and therefore a license was required by law); (2)

that the commodity or technology was in fact intentionally exported; and (3) that the exporter did not obtain a validated license authorizing the export.

Under the decision in *United States v. Mandel*, 696 F. Supp. 505 (E.D. Cal. 1988), there would be an additional element required for the government's burden of proof, *i.e.*, that the commodity was properly included on the Control List and was not freely available abroad.

Under the decision of the divided panel of the court below, the issue of whether the commodity or technology in question had, in fact, been placed on the Control List need not be proven by the prosecution. If the prosecution alleges the commodity or technology is in fact on the Control List, the allegation would be conclusive and irrebutable, even though it is guilt-determinative. The court below even explicitly stated that it did not matter whether the allegation was right or wrong, it was nevertheless binding on the trier of fact.

Given this disarray in the decisions governing the vital issue of what the elements of this federal crime are, the export industry by necessity must assume they will be subjected to the rule enunciated by the divided panel in the Ninth Circuit. Under this rule, no prudent exporter would risk exporting any commodity or technology without first having made a license application. This is particularly true in view of the position taken by the federal government in the instant case, and in *Mandel*.

It is not the purpose of this Brief to argue that the divided panel misconstrued the EAA and that Congress did not intend to make such a plenary grant of power to the President and the Secretary of Commerce. Nor is it the purpose of this Brief to argue that such a delegation raises Constitutional questions of the first magnitude. Rather, this Brief seeks to make the point that if the rule of the divided panel prevails, or if these conflicting rules are not resolved, that the United States export control system will become overburdened. Exporters will be reluctant to incur the risk of exporting any commodity or technology when the Secretary of Commerce, for whatever reason, can allege after the fact of export that the commodity or technology was on the Control List and required an export license. In such a system the mere act of exporting a commodity or technology may be made a crime. Whether the allegation is right or wrong is irrelevant, according to the court below. The normal judicial machinery - judges and trial by jury - would be powerless to check any abuse because under the decision of the divided panel of the court below, they are not competent to rule on the issue of whether in fact the commodity or technology has been placed on the Control List.

The practical result is that many exporters would be reluctant to incur such a risk and a great many more exports would be made only after seeking a license. The present system is inadequate to administer such a volume of applications. The result is plain. United States exports of high technology goods and data would be delayed by an

overburdened system to the sole advantage of foreign competitors able to promptly fill orders that American businesses would be unable to supply in a timely fashion.

CONCLUSION

LEOMA respectfully urges this Court to grant certiorari to clarify the law and resolve this vital issue.

Respectfully submitted,

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